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In the

Supreme Court of the United States.

OCTOBER TERM, 1937.

No. 55.

MARY DUKE BIDDLE, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF AMICI CURIAE.

The undersigned are attorneys for the United Shoe Machinery Corporation, the taxpayer involved in cases decided by the Circuit Court of Appeals for the First Circuit, 89 F. (2d) 363. The petitions for certiorari in those cases are pending in this Court as Nos. 185–187 of the October Term, 1937. The Circuit Court of Appeals for the First Circuit decided in favor of the taxpayer the question as to credits for British taxes under Section 238 (a) of the Revenue Acts of 1921, 1924 and 1926, which is substantially the same question as that involved in the *Biddle* case.

We submit that the Circuit Court of Appeals for the Second Circuit erred in the *Biddle* case.

I.

THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT ERRED IN HOLDING THAT THE TAXPAYER IS NOT ENTITLED UNDER SECTION 131 (a) OF THE REVENUE ACT OF 1928 TO CREDIT ON ACCOUNT OF BRITISH TAXES APPROPRIATE TO THE DIVIDENDS RECEIVED BY THE AMERICAN STOCKHOLDERS OF BRITISH CORPORATIONS.

The basis of the decision of the Circuit Court of Appeals for the Second Circuit appears to be contained in the following language of the opinion, 86 F. (2) 718, 720, 721:

> "Our system of credits and deductions is built around a concept of direct liability for taxation and direct payment. It is not administered upon the theory of ultimate burden or the final incidence of taxation. *Shearer* v. *Com'r,* 48 F. (2d) 552, 555 (C. C. A. 2.). . . .
>
> "In other words, our system, to describe it more accurately, looks to the statutory incidence of the tax—to the party which the taxing authority has made directly responsible."

We submit that this basis is entirely erroneous.

As is pointed out in the brief of the petitioner in the *Biddle* case, the Bureau of Internal Revenue for years construed Section 131 (a) of the Revenue Act of 1928 and similar language (including Section 238 of the Revenue Acts of 1921, 1924 and 1926) as applicable to the British tax on dividends.

Credits for foreign taxes were first provided for by the Revenue Act of 1918 (Act of Feb. 24, 1919, c. 18, Sec. 238 (a), 40 Stat. 1057). The published rulings of the Department of Internal Revenue show clearly that until 1933 British taxes were always allowed as a credit *as a direct tax* under Sec-

tion 238 (a) and other sections of the Revenue Acts. The rulings referred to have never been modified, amended or revoked. They were expressly followed in the latest formal ruling, I. T. 2401, VII-1 C. B. 126, in 1928; and in 1930 the Commissioner stipulated that the taxpayer should be allowed credit for British income taxes on the same theory. *Robillard* v. *Commissioner,* 20 B. T. A. 685. When such a construction has continued for a long time, as is here the case, it should not be upset "unless plainly wrong", and, *a fortiori,* when this construction is in favor of the taxpayer, and where, as here, Congress has reenacted the statute after realizing how British taxes were being treated.

The Government contends that there has been no implied ratification by Congress of the Commissioner's treatment of the British tax. But it is a fact that at least from 1925, when the matter was first considered, until the latter part of 1933, the British tax was uniformly treated by the Commissioner as a tax deductible under 238 (a). The language of Section 238 (a) of the Revenue Acts of 1921, 1924 and 1926, which the Commissioner held applied to the British income tax, was substantially reenacted in Section 131 (a) (1) of the Revenue Act of 1928 and again in Section 131 (a) (1) of the Revenue Act of 1932. Consequently the situation presents frequent instances of approval of Congress of the treatment which the Commissioner had accorded the British income tax.

The Commissioner should not now, in the case of a few isolated taxpayers, be permitted to change his

position completely. The petitioner is entitled to be treated for the years in question the same way that all other taxpayers were treated, unless there is a most cogent and compelling reason for not applying to it the equal protection of the laws, which is the protection of equal laws.

As the Court said in *Brewster* v. *Gage,* 280 U. S. 327, 336:

> "A reversal of that construction would be likely to produce inconvenience and result in inequality."

The construction which the Commissioner originally put upon the provisions of the Revenue Act under discussion and its application to the British tax is certainly a permissible one. That it was permissible would seem to be established beyond peradventure of a doubt by the fact that it has been upheld not only by the Bureau of Internal Revenue, but also by two Circuit Courts of Appeals in *United Shoe Machinery Corporation* v. *White,* 89 F. (2d) 363 (C. C. A. 1st, 1937), *supra,* and *Elkins* v. *Commissioner,* 91 F. (2d) 534 (C. C. A. 3rd, 1937).

We submit that the construction which the Commissioner originally put upon these provisions is the correct one.

The contention of the respondent here apparently is that the tax must actually have been assessed against the domestic taxpayer and paid directly by him.

The language of Section 131 (a) (1) and other similar acts does not require that in order to be credited thereunder, the foreign tax must be

assessed against or directly paid by the domestic taxpayer.

That physical payment is not determinative of the question as to whether taxes may be deducted or credited is well settled under the Federal Revenue Acts. Thus the Massachusetts gasoline tax imposed by chapter 316 of the Acts of 1928, although physically paid by the distributor, is deductible by the consumer. (See C. B. VIII-2, p. 112.) Similarly, the federal admissions and dues tax is deductible by the purchaser of the ticket or the club member, although not physically paid by him to the tax collector (26 U. S. C. § 940, 950, 955). The dividend tax imposed by the Federal Industrial Control Act, Section 213 (a), and the tax on bank checks imposed by Section 751 of the Revenue Act of 1932 were allowed as deductions as taxes paid by the recipients of the dividends and by the drawers of the checks.[1]

Analagous is the doctrine of constructive receipt of income, which is now well settled in federal income tax law. See *Old Colony Trust Co.* v. *Commissioner,* 279 U. S. 716; *United States* v. *Boston & Maine R. R.,* 279 U. S. 732.

Another analogy is found in the principle enunciated in *Douglas* v. *Willcuts,* 296 U. S. 1.

There the taxpayer created a trust, the income of which was to be used to pay alimony to his divorced

---

[1] Thus T. D. 4372, C. B. XII-2, p. 387, applying to persons receiving dividends taxed under the Industrial Control Act of June 16, 1933, says:

> ". . . such person may deduct in his income tax return the tax so withheld, in the same manner as other taxes allowed as a deduction by Section 23 (c) of the Revenue Act of 1932."

wife. The taxpayer never received this income and could not receive it. Nevertheless the Court held that this income must be taxed as his income because it was used to discharge his obligation and therefore he received the benefit of it.

We submit that the rule works both ways. This becomes particularly apparent in the case of a taxpayer owning preferred stock on which the dividend is limited to 6%. If the British tax is 10%, the stockholder gets only $5.40 and not $6., for the 60 cents is used to pay the tax and should be treated as a credit to him just as if he had received the $6. in the first instance and had paid the 60 cents after its receipt. Where income is used to discharge a man's liability, it is treated as his income, because if he received it directly he would have to use it to discharge the obligation. The two situations appear to us to be alike.

We submit that the Circuit Court of Appeals for the First Circuit was correct in saying in *United Shoe Machinery Corporation* v. *White,* 89 F. (2d) 363, 367:

> "In *Shearer* v. *Commissioner,* (C. C. A.) 48 F. (2d) 552, relied on in the Biddle Case, there was no requirement in the statute that the excise tax in question should be passed on to the consumer. The distinction seems to us vital."

Unless the British income tax is treated as a tax on the stockholder, there is no provision in any of the Revenue Acts allowing credit for the British taxes to any individual taxpayer or to any corporate taxpayer unless it owned a majority of the stock

of the British corporation. In the 1928 Act credit is given to individual taxpayers who are citizens of the United States and domestic corporations by Section 131 (a) (1), the section involved in the instant case. Section 131 (f) provides for a credit of a certain proportion of taxes paid by a foreign corporation to a foreign country in the case of a domestic corporation which owns a majority of the voting stock of a foreign corporation from which it receives dividends. There is no similar provision applicable to a domestic individual taxpayer owning a majority of the voting stock of a foreign corporation. Unless Section 131 (a) is construed in accordance with our contention, the provisions for credit for foreign taxes will not apply at all to most corporations owning stock in foreign corporations and will not apply to any domestic individual taxpayers owning stock in foreign companies except to a very limited extent. (The provisions of the earlier Acts, Section 238 (a) and (e) of the Revenue Acts of 1921, 1924, and 1926, are substantially identical.)

Admittedly, the credit provisions are relief provisions and it would seem highly unlikely that Congress intended to put in provisions which would relieve only a few wealthy American corporations and be of no benefit to individuals or the ordinary American corporation owning some stock of the British corporation. Undoubtedly, of all foreign taxes the British is of the greatest importance to Americans. (Practically all of the litigation in regard to foreign taxes seems to have been in regard to British taxes.) Great Britain was the father of the income tax law; and certainly Congress, in deal-

ing with credits for foreign taxes, could not have been unmindful of the British income tax. Did Congress mean that this British income tax could be used as a credit by American holding companies, but by no one else? It seems highly improbable that the measure would have passed in Congress if that had been understood.

II.

THE AMERICAN STOCKHOLDER MUST BE DEEMED AS PAYING THE TAX UNDER THE BRITISH LAW.

As the brief for the petitioner here points out, it seems that the only question which was properly in the case was a question of fact, *i. e.*, what the foreign law is.

This would seem to be conclusively settled in the case at bar by the uncontradicted testimony and the finding of the Board, which was accepted by the Circuit Court of Appeals of the Second Circuit. No occasion exists for this Court to depart from its usual rule that it will not review findings of fact concurred in by two lower courts.

It is also significant that the Circuit Courts of Appeals for two other circuits have come to the same conclusion of fact in regard to the nature of the British tax. *United Shoe Machinery Corp.* v. *White,* 89 F. (2d) 363 (C. C. A. 1st), *supra; Elkins* v. *Commissioner,* 91 F. (2d) 534 (C. C. A. 3rd), *supra.*

Certain outstanding significant facts in regard to the British tax are stated in the following extract from the opinion of the Circuit Court of Appeals for the First Circuit in *United Shoe Machinery Corp.* v. *White,* 89 F. (2d) 363, 366, *supra*:

". . . the British tax has to be considered in the light of other statutory provisions and of a long history of income taxation in that country. For more than 125 years the basic principle has always been to tax incomes at the source, and this principle is still recognized. British taxation of incomes antedated the wide use of business corporations. Shareholders are still regarded as having interests in the nature of those of partners in a business enterprise. In the British statute a corporation is taxed as 'a body of persons'. While it is settled that the tax is on the corporation, it is also settled that the amount of tax, appropriate to each share and deducted from the dividends, is to be considered as additional income of the shareholder; it is included in his income for supertax (surtax) purposes; he is referred to in the Income Tax Act of 1918 (the applicable statute) as a 'person who has paid by deduction * * * United Kingdom income tax', etc. (section 55 (1)). If a person who has received dividends makes a claim that his total income was below the taxable minimum, the tax appropriate to his dividends is added to what he in fact received for the purpose of determining his income; and, more significant still, if his income is below the taxable minimum, the amount of tax which was deducted from his dividends is returned to him by the government. *Ritson* v. *Phillips,* 131 Law T. 384. If the dividend is paid without deduction for tax, the appropriate amount is added to the shareholder's income for purposes of surtax or relief. In the case of the Ashton Gas Company which by its charter was restricted to dividends not exceeding 10 per cent., it was held that the 10 per cent. must include the appropriate tax and—assuming the tax to be 10 per cent.—only 9 per cent. could be paid. *Ashton Gas Co.* v. *Attorney General,* (1906) A. C. 10. The tax is

deducted from dividends on preference shares even when there is ample profit from which to pay it, *e. g.*, if the standard tax is 10 per cent., the dividend actually paid on 6 per cent. preferred stock is 10 per cent. less than that amount. The amounts thus deducted from dividends go to reimburse the company for the tax assessed on it. If the profits are made in one tax year, and dividends are declared in another, and the standard rate of tax is not the same in each year, there may be a difference in the amount of tax deducted from that actually paid—the deduction being made at the standard rate for the year in which the dividend is declared. Probably this discrepancy, when one occurs, is not regarded as a matter of much practical importance. It thus appears that, while the tax is assessed against the corporation, it falls and is by law required to fall, on the shareholders. It was said by the English Court of Appeal: 'The appellant here pays income tax although the tax is deducted at the source'. Warrington, L. J., *Brooke* v. *Commissioners*, (1918) 1 K. B. 257, 269. See too *Hamilton* v. *Commissioner*, (1931) K. B. 495."

A lucid explanation of the nature of the British tax is given in an historical note prepared by the Board of Inland Revenue, which is reprinted at pages 152–155 in an appendix to a report entitled "Income Tax in Great Britain", prepared in 1928 for the Joint Committee of Internal Revenue Taxation by Andre Bernard, and published pursuant to House Resolution 195 as House Document No. 332, 70th Congress, First Session. This note is printed in full in the appendix on pages 12 to 19, *infra*.

The brief of the Government argues that the petitioner in the case at bar has not shown that the British taxes were paid in the year 1929. (The case involves taxes for the year 1929.) But it is shown that they were deducted from the petitioner's dividends in that year. Consequently, they were in effect paid by her in that year. Whether they were paid by the British corporation in that year or not is unimportant. Congress could not have intended to require that, for the taxpayer to obtain the benefit of the credit, the payment of the tax by the taxpayer by deduction and the actual payment by the British corporation both occur within the same year. Under our system a very considerable part of the Federal income taxes deducted in a given year are not actually paid to the Government until a later year, *e. g.*, the 2% withheld from interest coupons, and the 10% withheld from dividends paid to aliens.

Respectfully submitted,

CLAUDE R. BRANCH,
EDWARD H. GREEN,
Amici Curiae.

December, 1937.

APPENDIX.

HISTORICAL NOTE ON TAXATION AT THE SOURCE

BY THE BOARD OF INLAND REVENUE.

(Reprinted at pp. 152–155 in an Appendix to a Report entitled *Income Tax in Great Britain*, prepared in 1928 for the Joint Committee of Internal Revenue Taxation by Andre Bernard and published pursuant to House Resolution 195 as House Document No. 332, 70th Congress, 1st Session.)

"Pitt's first real income tax, of 1799, was levied by means of direct assessments upon the recipients of the income, based upon returns of total income from all sources made by the taxpayers. The abuses to which this mode of assessment on total income was open led the framers of the income tax act of 1803 to make their approaches to the taxpayer in a less direct but more certain fashion. Instead of looking in the first place at the taxpayer, they looked at the source of income, classified incomes according to their kind under the Schedules A, B, C, D and E, and levied the tax so far as they could at the point where the income first emerged and became visible, leaving the first possessors of the income to deduct a proportion of the tax when distributing any part of the income among those who had charges upon it. So entered into our income tax system the great principle of taxation at the source, a principle which has lasted with many extensions and some notable recent

exceptions to the present day, and has proved of such central importance in income tax administration that Professor Seligman, of Columbia University, U. S. A., has recently called it 'perhaps the chief cause of the great success of the English income tax'.

"Though the act of 1803 had made this principle a central feature of the tax and applied it to many sources of income, it left some gaps in the system to be filled later in the light of experience. For example, in 1803 dividends due on the public funds were in the first instance taxable in the hands of the recipients; in 1806 this considerable exception was brought into the system of deduction at the source, and henceforward the interest was paid less tax.

"By this time the automatic effect of taxation at the source was evident in the yield of the tax. As Mr. Pressly told the select committee of 1851–52: 'In 1801, when the tax was 10 per cent, and the law required that everybody should make a return of his property, the net assessment [*i. e.*, yield or produce of the tax] was £5,628,000; but in 1806 (the rate then being also 10 per cent) the produce of the tax, under the present principle of taxing all property at its first source, was £11,633,000.'

"Peel's income tax act of 1842, which remained in force till April 5, 1919, and was only superseded by the income tax act, 1918—a consolidating act—was based on the act of 1806, and continued to tax income at its first source, leaving the distributors of income, whether they paid rent or interest or dividends or annuities, to deduct tax on payment. From 1842 until quite recent years no encroach-

ment upon that system was made, because the soundness of the principle and its effect in limiting the operations of the evader were generally recognized. Mr. Lowe, for example, in his unadopted draft report for the select committee of 1861, said 'the income tax, it is granted on all hands, must be raised at its source'. Indeed from 1842 onward the net was time after time thrown a little wider to catch a new kind of income. Thus, by a later act of 1842, dividends paid in this country out of the revenue of any foreign state were taxed in the hands of the person intrusted with the payment, and he was allowed to deduct tax from the dividends. Interest paid by colonial governments had already been included in the income tax acts of 1842. In 1853 the system was applied to dividends paid in this country by foreign companies, in 1861 to dividends of colonial companies, and in 1868 to payments out of Indian funds. In 1885 a further extension was made to secure deduction of tax by bankers and coupon dealers from coupons for dividends payable abroad. To this extension there was some opposition in the House of Commons on the part of bankers, who resented the proposal as the insertion of the thin end of the wedge between the banker and his customers. These representations were met by the insertion of a provision making it clear that bankers should not be under the obligation to disclose any particulars relating to the affairs of the persons for whom they might be acting. In 1888 a small defect was remedied, and interest which is not paid out of taxed profit was brought into the system; and in

1907 royalties paid for the user of a patent were added to the list.

"The combined effect of all these enactments is that at the present time [1919] taxation is levied at the source and deducted at the time of payment in the case of—

Dividends payable by limited liability companies.
Debenture and loan interest.
Interest on all British Government 'pre-war' securities and on certain securities issued since the war.
Interest on colonial and foreign government securities paid through agents in the United Kingdom.
Annuities and other annual payments.
Mineral rents, royalties, and wayleaves.
Patent royalties.
Interest not paid out of taxed profits (*e. g.*, interest paid out of rates).
Interest and dividends arising out of the United Kingdom and payable by colonial and foreign companies through agents in the United Kingdom.
Coupons for dividends payable abroad which are realized through a banker or coupon dealer in the United Kingdom.
Rents of property let to tenants.
Ground rents, lease rents, head rents, etc.
Mortgage interest.
Deposit interest in certain banks.
Salaries and pensions paid by government departments, including army, navy, air force, and civil services, and by railway companies.

"Both the recent committees which have inquired into the income tax had something to say on taxation at the source, and both were emphatic in

its praise. The departmental committee of 1905 spoke of the principle in their report as one 'which lies at the root of British income tax administration' and as being 'in itself a very great check on fraud and evasion'. The report of the select committee of 1906 affirmed that 'abandonment of the system of collection at the source . . . would be inexpedient'. In Sir Thomas Whittaker's draft report on which the final report was based, the stronger word 'disastrous' was used instead of 'inexpedient'.

"The select committee of 1906, appointed to consider the practicability of graduation and differentiation, necessarily gave same thought to the position of taxation at the source in the event of differentiation or graduation or both of them being adopted. The evidence pointed strongly in the direction of preserving the principle. The official witnesses insisted that it must be retained; Mr. Coghlan, with the experience of Australian systems, considered that graduation was not incompatible with taxation at the source; Mr. Chiozza Money's scheme, which included both graduation and differentiation, did not contemplate the abolition of the principle; Mr. Snowden, representing the Labor Party's views, considered taxation at the source advisable; and Mr. Harold Cox's scheme included its retention.

"The committee's report dealt with this subject in paragraphs 5 and 6 as follows:

> " '5: Graduation may be effected in various ways. First, there is the method of collecting the whole of the tax directly from each person upon his own declaration of income. If that

system were adopted it would be easy to levy a graduated rate of tax according to the total net income of the individual. Such a course would involve, however, the abandonment of the principle which is known as "collection at the source". The importance of retaining in our revenue system a principle which is mainly responsible for the present development of the tax and the ease with which it is collected, and the extreme undesirability of doing anything which would reduce its efficiency, can scarcely be overestimated. At the present time, indeed, something like two-thirds of the tax is collected before the income reaches the person to whom it belongs, and without any information being obtained or required as to the persons to whom it will go. It is interesting to recall the fact that a hundred years ago we abandoned direct personal assessment and collection at the source was substituted, with the result that the yield of the tax was almost doubled immediately. In 1803 an income tax of 5 per cent, collected at the source, yielded within a very small amount as much as a tax of 10 per cent did in 1801, when it was assessed and collected direct from each taxpayer.

"'6. Your committee are convinced that direct personal assessment for the whole tax is not practicable in this country, in the sense of being an expedient or desirable means of collecting revenue.'

"The imposition of a supertax in 1909, assessable directly upon the taxpayer on the amount of his total income from all sources, was only a partial departure from the orthodox doctrine of taxation at the source. Confined to persons with incomes over £5,000, and recommended by the 1906 committee, which has spoken so warmly in favor of preserving the principle of deduction, the supertax

still left the system of the income tax proper unimpaired, and collection at the source at the normal rate went on as before.

"The only real infringement since 1806 upon the system of collection by deduction at the source, so far as the ordinary income tax is concerned, has taken place in connection with certain British government securities issued in connection with the present war. The 4½ per cent loan issued in 1915 was dealt with in the old way and, except as regards small holdings on the post-office register, tax is deducted from its interest. But when financial pressure grew greater, and when more particularly it became necessary to look abroad for money, it was felt essential for nonrevenue reasons to raise loans the interest on which would not only be paid without deduction of income tax, but would, if the securities were in the beneficial ownership of persons who were not ordinarily resident in this country, be free from all liability to tax. Holders ordinarily resident in this country remained, of course, liable to the tax, and had to make a return of their interest for direct assessment. First of all, 5 per cent exchequer bonds, 1919, 1920, and 1921, then the 5 per cent war loan, and then national war bonds were issued subject to these conditions. In the case of registered stock or bonds the dividends are paid in full without deduction of income tax; where the bonds or stock are held in bearer form deduction at the source is retained. Owners ordinarily resident in this country are obliged to return the dividends for direct assessment upon them under Case III of Schedule D, and beneficial owners

not ordinarily resident in the United Kingdom are not liable at all.

"This led to some inconvenience on the part of holders who, for security's sake, wanted to have inscribed or registered bonds or stock, and yet did not want the trouble of making returns and paying duty by direct assessment upon what was in many cases their only item of income untaxed by deduction. To meet these objections the latest issue of national war bonds (4th series) introduces a new form of holding, 'registered coupon bonds'. Holders of this form of bonds are enabled to obtain their securities in a registered form, transferable by deed, and at the same time to have their dividends taxed by deductions before receipt.'"

"[4] Royal Commission on the Income Tax, Minutes of Evidence, I, Appendix No. 7 (g), pp. 61–62."

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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 505

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

GEORGE W. ELKINS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 14, 1937
CERTIORARI GRANTED NOVEMBER 8, 1937

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United States Board of Tax Appeals.

DOCKET NO. 75742.

GEORGE W. ELKINS,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

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For Respondent: Dean P. Kimball, Esq.,
Hunter B. Linton, Esq.

DOCKET ENTRIES.

Apr. 24, 1934.	Petition received and filed. Taxpayer notified. (Fee paid.)
Apr. 24, 1934.	Copy of petition served on General Counsel.
June 11, 1934.	Answer filed by General Counsel.
June 19, 1934.	Copy of answer served on taxpayer.
Oct. 5, 1934.	Motion to place on the Day Calendar of Nov. 12, 1934 filed by taxpayer. 10/6/34 granted.